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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. LONNIE CHARLES DOWNING, Defendant and Appellant.	C084947 (Super. Ct. No. 16CR25416)

Found guilty by a jury of misdemeanor spousal battery but acquitted of simple battery against a different victim, defendant Lonnie Charles Downing contends the trial court erred by failing to instruct the jury to begin deliberations anew after an alternate juror was seated. Agreeing with the People that the error was harmless given the strong evidence in support of the spousal battery charge, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 3, 2016, Gregory A., who lived upstairs from defendant in an apartment complex in Amador County, saw defendant around the complex, but did not

see defendant's wife, S. M., or their two sons. Gregory A. found this unusual because S. M. was always home.

Gregory A. saw defendant drive away in a red Dodge pickup. Later, he saw S. M. drive into the complex with her sons and her friend J. E.

When defendant returned in the pickup, Gregory A. sensed impending trouble and called 911. He heard S. M. call to J. E.: "Here comes Lonnie!" Both women started to run toward S. M.'s car. Defendant intercepted S. M. as she approached the car, telling her: "[Y]ou are not going to take my kids."

Defendant put the crook of his left elbow around S. M.'s neck as he grabbed her car keys away from her. J. E. saw that defendant was choking S. M. and twisting her arm and hand. S. M., in pain, begged defendant to stop, but he replied: "[S]hut up."

J. E. grabbed defendant's shoulder to try to get him off S. M.; he elbowed J. E. in the left pectoral region. He kept twisting S. M.'s arm until he had forced her down onto her knees, then knocked her into the front passenger side of the car next to them.

S. M. saw defendant open the door where their son J. was sleeping, then shut the door and walk around to the other side of the car where their son C. was sitting; C. was crying and saying: "No, daddy, no, daddy!" Defendant unlatched C.'s seatbelt and appeared to S. M. to be strangling C.

J. E. followed defendant and pushed him into the car when he was near the backseat; he pushed back toward her with his leg. J. E. wrested the car keys from defendant, but he grabbed her left wrist (in a splint after recent surgery) and squeezed it so painfully that she dropped to her knees. He then took C. into his and S. M.'s apartment and told him to stop crying.

The police arrived a few minutes after the 911 call. S. M. was taken to the emergency room, received a prescription for Ibuprofen for her wrist pain, and given a wrist brace which she had to wear for a week; her medical records were introduced in evidence.

S. M. testified that she and defendant had been married for 14 years, but on the date of the crimes she was in the process of moving in with J. E. to get away from defendant, who had hurt her before. Before defendant intercepted them, they were taking turns going into the apartment to retrieve her sons' clothes, while the boys waited in the backseat of her car.

Defendant testified that he had been unhappy before the date of the crimes when S. M. took their sons and stayed at J. E.'s home overnight because he had once seen J. E.'s dog bite C. on the leg.

On the date of the crimes, defendant returned to the apartment complex and saw his sons unattended in the back of S. M.'s car; he tried to get them out, but the doors were locked. When S. M. and J. E. emerged from the apartment, he asked S. M. where she was going. She told him they were going to J. E.'s house. He said he did not want them over there "being bitten," then grabbed the car keys and pushed the unlock button. Walking around the car, he got one of his sons out and went into the apartment. He and S. M. struggled for the car keys, but he was not trying to hurt her, he just wanted to take the boys inside. J. E. then grabbed the keys from him, pushed him, and grabbed his arm. Defendant denied that he squeezed J. E.'s wrist and forced her to the ground, or that he slammed S. M. into the car and choked her. He admitted, however, that during the struggle with S. M., he heard her say: "You're hurting me."

The jurors began to deliberate at 10:03 a.m. on May 17, 2017. At 11:20 a.m., the trial court informed the parties that Juror No. 5 was having an "absolute breakdown," "sobbing uncontrollably," and unwilling to go on deliberating. The alternate juror had been contacted and was coming in. The court discharged Juror No. 5.

At 11:29 a.m., the trial court brought the jurors back into the courtroom and instructed them they would have to stop deliberating until the alternate juror arrived. While the jurors were on lunch break, the alternate arrived and was sworn in at 12:30 p.m. The jurors reached a verdict at 2:12 p.m.

CALCRIM No. 3575 applies whenever an alternate juror is seated. It reads as follows: "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant(s) have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now, please return to the jury room and start your deliberations from the beginning."

Under Penal Code section 1089, the trial court has a duty to give CALCRIM No. 3575 sua sponte if an alternate juror has been seated. (*People v. Collins* (1976) 17 Cal.3d 687, 693-694, overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19; *People v. Renteria* (2001) 93 Cal.App.4th 552, 558-559.) The court did not give it here.

DISCUSSION

Defendant contends the inadequate instruction given here, which did not include the admonition to begin deliberations anew, requires reversal. (Cf. *People v. Renteria*, *supra*, 93 Cal.App.4th at p. 560.) The People contend the error was harmless because the evidence against defendant as to spousal battery was strong. We agree with the People.

The failure to give CALCRIM No. 3575 is reviewed under the *Watson*[1] standard. (*People v. Collins*, *supra*, 17 Cal.3d at p. 697; see *People v. Proctor* (1992) 4 Cal.4th 499, 537; *People v. Renteria*, *supra*, 93 Cal.App.4th at p. 559.) We conclude it is not

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[1] *People v. Watson* (1956) 46 Cal.2d 818.

reasonably probable that defendant would have obtained a better outcome if the trial court had properly instructed the jury on this point.

S. M.'s testimony describing defendant's battery on her was supported by the eyewitness testimony of Gregory A. and J. E., and by the medical evidence of her injuries. Defendant's story was uncorroborated and failed to explain how S. M. was injured. There is no evidence of any probability that the jury would have decided otherwise if properly instructed to disregard whatever deliberations may have occurred between 10:03 a.m. and 11:20 a.m., when the court was told the dismissed juror had been refusing to deliberate for an unspecified period of time.

The jury's failure to find defendant guilty of battery on J. E. does not count against this conclusion. Even by her own account, she acted aggressively to help her friend, and the jury might have been unable to find beyond a reasonable doubt that this was not an instance of mutual combat or of self-defense by defendant -- theories raised by the defense and instructed on by the trial court.

This was a factually simple case, taking only one court day to present evidence. The jury began deliberating the next day at 10:03 a.m., when it was sent from the courtroom. Presumably, the jurors first took some time to settle in and choose a foreperson, as they were instructed to do. (CALCRIM No. 3550.) At 10:45 a.m., the foreperson sent a note requesting a readback of Gregory A.'s testimony. The trial court considered that note at the same time as it considered the "most compelling issue" that had already surfaced -- one juror's failure to deliberate. At 11:20 a.m., the court told the lawyers that the one juror did not "want to go back into the deliberation room" and "doesn't want to go back and deliberate," suggesting that she had been out of the jury room for several minutes. The jury had been instructed with CALCRIM No. 3550 that it was to deliberate "only when all jurors are present," and we presume the jury understood and followed its instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) By 11:29 a.m., the court had replaced the juror with the alternate and sent the jury to lunch; it

started deliberations with the new juror at 12:30 p.m. and reached verdicts over an hour and one-half later. Thus the jury's time for deliberation as originally constituted was minimal; it appears all jurors were present for a maximum of 77 minutes, not all of which was spent deliberating. Time was spent to dispense with preliminaries and more time was spent while the replaced juror refused to deliberate. Further, the jurors did not have the benefit of their early request for readback of witness testimony and seemed primarily concerned with the issue of an uncooperative juror, leaving little time to deliberate defendant's case. Lastly, nothing in the record suggests the jury had any particular difficulty reaching its verdict on either count. The one request for readback was granted and provided to the jury after the alternate had been sworn, so the newly seated juror had the same material before her as the others. All of these facts point toward the conclusion that the trial court's error was harmless under *Watson*.

Defendant relies only on *People v. Martinez* (1984) 159 Cal.App.3d 661, where the defendant was convicted of first degree murder after bursting in on his estranged wife and her boyfriend (the murder victim) in the act of sexual intercourse. (*Id.* at pp. 663-664.) The *Martinez* court could not find the instructional error harmless because, in its view, the case presented close factual and legal issues as to premeditation and malice. (*Id.* at p. 665.) Defendant does not identify any such close issues in this case as to spousal battery. Further, the jury in *Martinez* had deliberated for hours prior to the substitution. (*Id.* at p. 666.) Thus, *Martinez* is inapposite.

DISPOSITION

The judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Duarte, J.

/s/
Renner, J.